Nos. 06-82, 06-84, 06-100, and 06-101

File Aug. 21, 2006

In The
Supreme Court of the United States

HARTFORD FINANCIAL SERVICES GROUP, INC., *et al.*,

Petitioners,

-vs-

JASON RAY REYNOLDS, *et al.*,

Respondents.

SAFECO INSURANCE COMPANY OF AMERICA, *et al.*,

Petitioners,

-vs-

CHARLES BURR, *et al.*,

Respondents.

[Additional Captions On Inside Cover]

On Petitions For Writs Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Case 06-100

GEICO GENERAL INSURANCE COMPANY, *et al.*,

Petitioners,

v.

AJENE EDO,

Respondent.

Case 06-101

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

JULIE WILLES,

Respondent.

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size, in every industrial sector and from every region of the country.[1] A principal function of the Chamber is to advocate the interests of the business community by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses.

The Business Roundtable ("Roundtable") is an association of chief executive officers of leading American companies with over $4.5 trillion in annual revenues and more than ten million employees. The Roundtable's member companies comprise nearly one-third of the total value of the United States stock market, and represent nearly one-third of all corporate income taxes paid to the United States government. Collectively, the Roundtable's member companies returned more than $10 billion in dividends to shareholders and the American economy in 2005. The Roundtable is committed to advocating public policies which ensure vigorous economic growth and a productive workforce in America.

The Fair Credit Reporting Act ("FCRA") is a fundamental part of how business is conducted in this country. Nearly every type of commerce involves a party's credit history, for purposes as diverse as determining eligibility for mortgages, personal and business loans and other financial services; verification of educational records for licensing purposes; establishing an account for the purchase and service of telephones and other goods; and to confirm the identity, references and other background information of individuals seeking employment or promotion.

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[1] Pursuant to United States Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the Chamber and the Roundtable made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amici* brief, and their consent letters are on file with the Clerk of Court.

For this reason, the questions presented in these cases – namely, the scope of "adverse action" under the statute as it pertains to the sale of insurance, and the threshold of liability for "willful" violations of the FCRA – while of great concern to the nation's insurers, also go far beyond the provision of insurance to individual consumers. If left to stand, the Ninth Circuit's decision would unfairly expose the nation's businesses to liability for "willful" violations of the FCRA even when making a good-faith effort to comply with the statute; needlessly introduce uncertainty into countless transactions; and burden businesses and individuals alike with myriad unclear, even meaningless, notices under the FCRA.

The members of the Chamber and the Roundtable depend upon the procedures of the FCRA to accomplish all of these important purposes, and more. For the members of the Chamber and the Roundtable, it is therefore vital that the FCRA provide clear and consistent guidance as to a business' obligations when that business consults credit reports. And it is likewise important not only for every employer, merchant and service provider in the country – but for every consumer, employee and job applicant as well – that the required communications under the FCRA be understandable and helpful.

Accordingly, the Chamber and the Roundtable support the Petitions for Writs of *Certiorari* in these cases.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The case presents this Court with the opportunity to resolve a well-developed split between the Circuits concerning important, pervasive and recurring questions of federal law. The Ninth Circuit's holdings as to "adverse action" and "willfulness" under the FCRA are erroneous and pose devastating consequences for the daily transaction of business in this country. If left to stand, the Ninth Circuit's decision will needlessly introduce unfairness, uncertainty and confusion to all sectors of the American economy.

The Ninth Circuit's decision departs from both the unambiguous text of the FCRA and the case law established under that statute. Without intervention from this Court, the

Ninth Circuit's decision would dramatically expand the occurrences of "adverse actions" under the statute – rendering the accompanying "adverse action" notices to consumers so frequent and confusing as to be meaningless – and collapse the FCRA's express distinction between "willful" and non-willful violations of its terms.

The Ninth Circuit's Error as to "Adverse Action" under the FCRA

In the context of the sale of insurance, the FCRA expressly defines an "adverse action" as a denial, cancellation, increase in the change for, or change in the terms of coverage. Yet the Ninth Circuit's construction of "adverse action" ignores that statutory definition. Instead, the Ninth Circuit's decision expands the scope of "adverse action" to encompass any occasion in which an insurer consults a consumer's credit report and offers the consumer anything other than the insurer's best possible rate for insurance. That result is not only violative of the language of the statute, it also leads to absurd results.

The Ninth Circuit's definition of "adverse action" is confusing and impractical. No insurer can offer the lowest possible rate for its products to more than a small fraction of its customers (at least not while remaining in business). This fact alone would result in millions of consumers receiving "adverse action" notices for no reason other than that they were not offered the rate received by insurers' best customers. Still more puzzling is that the review of a consumer's credit report often leads the insurer to offer the consumer a better rate than would have been offered if the credit information had not been consulted. And yet, if that rate were anything less than the best available rate, the Ninth Circuit decision would require the insurer to send an "adverse action" notice to the consumer – despite the fact that both the consumer and the insurer were better off because of the use of the information in the credit report.

The impact of the Ninth Circuit's decision is also likely to be felt far beyond the insurance industry. The FCRA uses the same or substantially the same language to define "adverse action" in its provisions relating to other activities, including

the administration of regulatory licenses, eligibility for government benefits, and the use of credit reports for purposes of employment. As a result, the Ninth Circuit's decision can be expected to influence the construction of these related provisions of the statute. This would require the Ninth Circuit's "adverse action" notices to be sent in countless other contexts – including occasions in which an employer's review of a job applicant's credit report led to the offer of a more lucrative position than that in which the applicant was interested, but not the very best job offered to others.

The Ninth Circuit also erred by ignoring the plain language of the FCRA and announcing new components to be included in every "adverse action" notice. The FCRA clearly provides that only two pieces of information must be included in such a notice: (i) the contact information for the credit reporting agency which provided the report, and (ii) the recipient's right to receive a free copy of that report. But the Ninth Circuit's decision added to this list by also requiring an explanation of the specific "effect" of the action upon the consumer, as well as a series of disclosures regarding "affiliated" entities uninvolved with the particular transaction – if not also an identification of the exact information at issue in the report. The Ninth Circuit's decision further departs from the statute by imposing joint and several liability for the failure to craft an appropriate notice.

The Ninth Circuit's decision flies in the face of the FCRA's express mandate; is so ill-defined as to be difficult, if not impossible, for businesses to follow; invites litigation over the form of notice; and will cause confusion instead of reducing it.

The Ninth Circuit's Error as to "Willful" Violations of the FCRA

The FCRA contains a clear distinction between different levels of liability for "willful" and non-willful violations of its terms. A "willful" violation carries with it the potential liability for unlimited punitive damages, while non-willful violations are addressed by less severe remedies. Differentiating between the two levels of liability reflects a purposeful choice by Congress to treat more severely those who act to violate the

FCRA despite knowing (or intentionally blinding themselves to the fact) that their actions are unlawful.

The Ninth Circuit's decision construing these provisions of the FCRA effectively erases the distinction between "willful" and non-willful violations of the statute. The Ninth Circuit's decision redefines "willful" to encompass even actions which are negligent and unintended. Still worse, the Ninth Circuit's decision significantly erodes (if not eliminates) consultation with counsel as a defense against allegations of "willful" violations of the FCRA, and even invites discovery into the well-established privilege that protects confidential deliberations between attorney and client.

The Ninth Circuit's decision is also contrary to the well-reasoned case law of other federal Courts of Appeal which have considered this issue. A "willful" violation of the FCRA should be limited to incidents in which a party acts in derogation of the statute knowing that such actions are unlawful, or deliberately avoiding such knowledge. Consultation with counsel regarding unsettled areas of law under the FCRA ought to be a meaningful, if not dispositive, defense against a "willful" violation of the statute.

Other federal statutes which utilize the same or similar language and remedial structure as the FCRA – such as the Age Discrimination in Employment Act, the Fair Labor Standards Act, and the Family and Medical Leave Act – have been so construed by this Court, as well as by other federal courts (including the Ninth Circuit). But the Ninth Circuit's decision threatens those holdings and exposes the nation's businesses to inconsistent treatment of the same behavior. Indeed, the Ninth Circuit's decision would punish behavior which for other purposes is considered good-faith and even exculpatory.

If left undisturbed, the Ninth Circuit's decision will undermine the guidance provided by the FCRA to the nation's business community, and replace it with uncertainty as to how to prevent the devastating liability which can accompany "willful" violations of the statute.

REASONS FOR GRANTING THE WRITS

The Petitions for Writs of *Certiorari* should be granted. The Ninth Circuit's decision presents a well-developed split in authority between the Circuits, and is erroneous in two important ways: (1) its holding as to what constitutes an "adverse action" and corresponding notice under the statute; and (2) its holding as to what is a "willful" violation of the FCRA.

If permitted to stand, the Ninth Circuit's decision will introduce unfairness, uncertainty and confusion to the countless transactions which occur every day, in every part of the country, and in every sector of the economy.

I. THE NINTH CIRCUIT'S CREATION OF NEW "ADVERSE ACTION" STANDARDS IS ERRONEOUS AND HARMFUL TO BUSINESSES AND CONSUMERS

The Ninth Circuit's decision is a radical departure from the statutory bases for an "adverse action" under the FCRA. While Petitioners have articulated numerous reasons why the Ninth Circuit's decision is not based in law and how it will needlessly disrupt the provision of insurance, the full impact of the decision is hardly limited to the insurance industry. If left to stand, the Ninth Circuit's decision will influence the FCRA practices of all other industries which consult credit reports, leading to unfairly burdensome requirements and confusing communications to consumers in all sectors of the economy.

A. The Ninth's Circuit's "Adverse Action" Holding Would Harm Insurers and Their Consumers

The Ninth Circuit's decision is likely to mislead consumers rather than inform them. Under the Ninth Circuit's holding, an "adverse action" occurs each time an insurer declines to offer a consumer the "best possible rate," based in any way upon the contents of that consumer's credit report. *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1093 n.11 (9th Cir. 2006). However, it is infeasible for insurers to offer their "best possible rate" to more than a small percentage of their customers – at least, not while still hoping to stay in business. Accordingly, under the Ninth Circuit

decision, all other consumers seeking insurance – that is, the vast majority of consumers – would automatically receive an adverse action notice upon applying for insurance. *Id.*

This would be particularly misleading in instances when an insurer used a consumer's favorable credit report to offer the consumer a rate ***better*** than that which would have been offered but for the information obtained from the credit report. In such a case, the ***consumer benefits*** from a review of her credit report. Likewise, the ***insurer benefits*** from a better understanding of a potential customer and its own exposure to risk. And yet, under the Ninth Circuit decision, the insurer would be obligated to send the consumer an "adverse action" notice if the more attractive rate offered to the consumer was anything less than the insurer's "best possible rate."

That outcome disserves both the business and the consumer. Although the insurer obtained information which contributed to a more positive experience for the consumer, the insurer nevertheless would imperil the consumer's good will by sending the consumer a notice that the insurer had "acted adversely" toward her. In the same way, although the consumer is financially better-off because the insurer consulted her credit report, her receipt of an "adverse action" notice would lead her to believe the opposite were true. This is simply not what an "adverse action" should entail.[2]

This result is as much at odds with common sense as it is with the FCRA. The Ninth Circuit decision should not be allowed to stand.

B. The Ninth Circuit's "Adverse Action" Holding Would Harm Businesses, Consumers, Employees and Job-Seekers in All Industries

The Ninth Circuit's decision also imperils businesses and individuals in contexts other than the purchase of insurance.

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[2] For example, Black's Law Dictionary defines "adverse" as "opposed; contrary; in resistance or opposition to a[n] . . . application." Black's Law Dictionary 53 (6th Ed. 1990). Offering a consumer a better rate is hardly an action taken "in opposition to an application" or otherwise "adverse" to the consumer's interests. *Id.*

Most vulnerable to burdensome requirements and consumer confusion as a result of the Ninth Circuit's decision are parties involved in licensed occupations and the administration of government benefits, as well as employers across all fields of endeavor.

1. The Harm from Applying the Ninth Circuit's Holding to Government Instrumentalities

The statutory text erroneously construed by the Ninth Circuit in this case also appears in the provisions of the FCRA addressed to eligibility for governmental licenses and other state benefits. *See* 15 U.S.C. § 1681a(k)(1)(B). As such, the statute itself would appear to invite application of the Ninth Circuit's holding to those contexts, as well – thereby only compounding the confusion strewn by this incorrect decision.

Specifically, the FCRA defines "adverse action" in the insurance context as:

> ***[A] denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of*** coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

The FCRA uses the very same language to define "adverse action" as it relates to a "consumer's eligibility for a license or benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status:"

> ***[A] denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of,*** any license or benefit described in section 604(a)(3)(D).

See 15 U.S.C. § 1681a(k)(1)(B)(iii) (emphasis added).[3]

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[3] Section 604(a)(3)(D) of the FCRA provides that a person may obtain a consumer report for the purpose of determining a "consumer's eligibility for a license or other benefit granted by a governmental

(Continued on following page)

This identical statutory language, coupled with the paucity of case law construing Section 1681a(k)(1)(B)(iii) of the FCRA, raises the very real possibility that the Ninth Circuit's erroneous interpretation of what constitutes an "adverse action" will be imported to apply to governmental entities conferring licenses or benefits. Accordingly, those regulatory agencies – as well as the businesses and individuals who apply for those licenses and benefits – will find themselves in the same positions as insurers and applicants for insurance policies. Under the Ninth Circuit's "adverse action" mechanism, these activities, too, would be characterized by a deluge of unnecessary and confusing "adverse action" notices.

2. The Harm from Applying the Ninth Circuit's Holding to Employment-Related Background Checks

The statutory text erroneously construed by the Ninth Circuit is also shared by the sections of the FCRA regarding background checks in the context of applications for employment or promotion. Again, this renders the Ninth Circuit's errors unlikely to be contained solely within the market for insurance. To the contrary, the language of the statute facilitates the application of that erroneous decision to the nation's job-seekers in all fields of employment.

In particular, the FCRA defines "adverse action" in the insurance context as ***any "adverse or unfavorable change in the terms of"*** insurance coverage." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

Similarly, the FCRA defines "adverse action" in the employment context as any decision which ***"adversely affects any current or prospective employees."*** 15 U.S.C. § 1681a(k)(1)(B)(ii). That is, the FCRA treats an "adverse action" substantially similarly for both insurance and employment purposes: namely, it can be anything that adversely affects an individual's interests.

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instrumentality required by law to consider an applicant's financial responsibility or status." 15 U.S.C. § 1681b(a)(3)(D).

Consider the impact of applying the Ninth Circuit's holding to employers which conduct background checks for prospective and current employees. Nearly all employers in the United States fall into this category. According to the Society of Human Resource Management's "Reference and Background Checking Survey Report" (January 2005), approximately ***96% of all employers*** conduct background checks of some kind, including credit history reports, as to job applicants or employees.

Under the Ninth Circuit's holding, would all of these employers need to dispatch "adverse action" notices in every instance in which an applicant is not offered the "best possible position"? For example, if an individual indicates on his job application that he is interested in several different positions, and ultimately is hired for one of them (or even another position altogether), is there an "adverse action" if that position is somehow less desirable than the others in which he was interested? Or if that position is deemed relatively less attractive than the "best possible position"?

These results are equally as absurd as requiring an insurer to send an "adverse action" notice as a result of using an applicant's credit report to offer him a better rate on insurance. And yet that is exactly the confusion that the Ninth Circuit's decision would cause among the vast number of American employers who utilize background checks as a factor in their decisions to hire or promote.

3. The Harm from Applying the Ninth Circuit's Holding to Employment-Related "Pre-Adverse Action" Notices

Employers and job applicants would also feel the burden of the Ninth Circuit's decision in other ways. Specifically, the FCRA imposes upon employers who are contemplating taking an adverse action for an employment purpose the additional requirement of sending a "pre-adverse" action letter prior to actually taking the "adverse action." 5 U.S.C. § 1681b(b)(3). Under the Ninth Circuit's expansion of the amount of "adverse actions," so too would the number of "pre-adverse action" notifications dramatically increase.

In addition to the overwhelming burden upon businesses of trying to comply with such a regime, this poses two very real alternatives in the nation's workplaces. Either:

- Job applicants and employees alike would be inundated with "pre-adverse action" and "adverse action" notices such that their intended effect – allowing consumers to correct incorrect information before it could be acted upon – would be lost; or
- Employers would be inundated with inquiries regarding these "adverse actions" taken as to every job applicant, newly hired employee, promoted employee and employees who applied for promotion, to the detriment of activities that actually maintain and grow their businesses so that hiring can occur.

Both of these results are contrary to the FCRA, because they would render meaningless the statute's "adverse action" notice requirements. *See, e.g., Beck v. Prupis,* 529 U.S. 494, 506-07, 120 S. Ct. 1608, 1617 (2000) (restating "longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous"); Hearing, Senate Committee on Banking, Housing & Urban Affairs, 108th Congress 95-96 (2003) (Testimony of J. Howard Beales III, Director of Federal Trade Commission) (consumers will ignore notices if received too frequently).

Nor would it be appropriate if this erroneous reading of the FCRA operated as a disincentive to employers to conduct background checks. Such inquiries are an important safeguard against ills which vary from theft and violence in the workplace, to identity theft, to liability for negligent retention or hiring. Moreover, the provision of such background screening services is itself a significant part of the American economy. *See, e.g.,* KPMG Corporate Finance LLC, "The Market is Undergoing Dramatic Change. What Are the Opportunities For Your Business?" Background Screening, Fall 2003 (employment-related background checks approximately a $2 billion annual business). There would be no avoiding the detrimental impact of the Ninth Circuit's decision upon all manner of employers, employees and job applicants.

C. The Ninth Circuit's Creation of New Requirements for "Adverse Action" Notices Is Erroneous and Harmful to Businesses, Consumers, Employees and Job-Seekers

The Ninth Circuit also erred by departing from the plain language of the FCRA and introducing new requirements for the contents of an "adverse action" notice. The text of the FCRA is unambiguous and detailed regarding what an "adverse action" notice must contain. *See* 15 U.S.C. § 1681m(a). The Ninth Circuit disregarded these clear standards, replaced them with ill-defined and confusing new requirements, and left open the possibility that still more could be added by judicial re-drafting of the statute.

The FCRA plainly states that upon taking an "adverse action" based upon a credit report, a business must provide the consumer with a notice that conveys two basic pieces of information about the "adverse action":

(1) The contact information of the consumer reporting agency which furnished the report, along with a disclaimer that such agency did not make the "adverse action" decision and is therefore unable to provide the reasons why the action was taken; and

(2) The consumer's right to receive a free copy of the report within sixty days, and to dispute inaccurate or incomplete information contained in the report.

15 U.S.C. § 1681m(a).

The Ninth Circuit's decision disregards these clear requirements and instead adds a third, which is found nowhere in the text of the statute: that the notice must also ***"specify the effect of the action upon the consumer."*** *Reynolds*, 435 F.3d at 1095 (emphasis added).

Still further beyond the statute, the Ninth Circuit also held that if an "adverse action" notice is issued by an entity belonging to a group of "affiliated" entities, the notice must also "describ[e] the adverse effect of [the] credit report within that family of companies," "identif[y] those companies and their respective roles," and "explain the actions each affiliated

company took." *Id.*, 435 F.3d at 1096. Under the Ninth Circuit's holding, failure to provide a conforming notice would result in ***"joint and several liability"*** among all such "affiliated" companies, even those which had no involvement whatsoever with the consumer or transaction at issue. *Id.* (emphasis added).

But the Ninth Circuit's novel construction of the statute does not even stop there. In a footnote, the Ninth Circuit invites the question of whether a notice should *also* contain "a fuller description of what specific information was adverse" to the consumer. *Id.*, 435 F.3d at 1095 n.14 (emphasis added).

The Ninth's Circuit decision is contrary to the most basic and long-established element of statutory construction: that an unambiguous statute means what it says. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 187, 124 S. Ct. 1587, 1596 (2004) ("Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction") (quoting *United States v. Fisher*, 6 U.S. 358 (1805)). For this reason alone, the Ninth Circuit's decision is erroneous and should be reversed.

But just as with the other aspects of the Ninth Circuit's holding, this is about more than an appellate court making a wrong decision. By fundamentally changing – and expanding – the required contents of an "adverse action" notice, the Ninth Circuit holding is poised to spread confusion throughout a far wider cross-section of the American economy than just the insurance industry.

To revisit an example discussed above, the Ninth Circuit decision would leave businesses guessing as to how to state the adverse "effect" upon an employee of being placed in a better job than she would have been eligible for if the business had not checked her credit report. Similarly confusing would be how to convey the adverse "effect" where a job applicant was offered the highest-paying job for which he applied, but not the highest-paying or otherwise "best" position which was available at the business. Add to this the need to identify and explain the workings of "affiliated" entities wholly removed

from the event at hand, and composing (much less deciphering) a compliant notice would be nonsensical, if not impossible.

And yet the failure to do so might be considered a "willful" violation of the statute, with attendant, potentially unlimited liability for entire groups of "affiliated" companies. No one – businesses, licensing agencies, employers, employees, or job applicants – would benefit from the Ninth Circuit's decision. All would be worse off for it.

II. THE NINTH CIRCUIT'S "WILLFULNESS" HOLDING IS ERRONEOUS AND HARMFUL TO BUSINESSES AND EMPLOYERS

The Ninth Circuit erred in its construction of the FCRA provision allowing for enhanced remedies in the event of a "willful" violation of the statute. 15 U.S.C. § 1681n(a). As addressed at length in the Petitions, the Ninth Circuit's holding is contrary to the bedrock principles of statutory interpretation and invariably leads to absurd and unfair results. For these reasons alone, the holding should be reviewed and reversed.

But of particular concern to the memberships of the Chamber and the Roundtable are two potentially devastating effects of the Ninth Circuit's holding: (1) the uncertainty caused by the Ninth Circuit's departure from the established case law of other federal courts of appeal; and (2) the risk of liability for actions which have consistently been treated as good-faith and exculpatory under other federal statutes which utilize the same language and remedial structure as the FCRA.

A. The Harm Caused by the Ninth Circuit's Erroneous Interpretation of a "Willful" Violation of the FCRA

The Ninth Circuit's novel and unfairly expansive definition of a "willful" violation of the FCRA presents businesses across all industries with uncertainty and the prospect of catastrophic liability, even for good-faith attempts to comply with the statute. That result ought not stand.

1. The Importance of Clearly Defined Rules of Liability

The FCRA plainly distinguishes between non-willful and "willful" violations of its terms. To this end, the FCRA specifically provides that in the event of "***negligent noncompliance***" with the statute, a business's liability is limited to a plaintiff's actual damages. 15 U.S.C. § 1681o (emphasis added). On the other hand, the FCRA expressly provides that in the event of "***willful noncompliance***" with the statute, a business's liability includes not only actual damages, but also a possible award of unlimited punitive damages. 15 U.S.C. § 1681n(a) (emphasis added).

This distinction is meaningful, yet the Ninth Circuit's holding threatens to collapse it by rendering even unintentional and well-meaning violations of the statute eligible for the imposition of exemplary damages. Such an outcome would be potentially devastating to all the businesses across the nation whose operations depend upon a clear understanding of the FCRA. Those businesspeople need to know – indeed, they deserve to know – whether they stand to be punished for good-faith reliance upon the advice of counsel regarding unsettled issues under the FCRA. By massively expanding liability under the FCRA, the Ninth Circuit not only ignores the plain meaning of the FCRA, but the well-reasoned holdings of other federal courts of appeal.

2. The Ninth Circuit's Holding Is Contrary to the Established Case Law of Other Federal Courts of Appeal

The Ninth Circuit's interpretation of a "willful" violation of FCRA is a significant departure from the prior case law construing that provision of the statute. Those decisions held that a violation is not "willful" if, before engaging in the conduct at issue, the defendant takes steps to ascertain whether its actions will be violative of the law.

For example, the Sixth Circuit has held that a defendant cannot "willfully" violate the FCRA if the defendant "obtained [the consumer's] reports 'under what is believed to be a proper purpose under the statute but which a court

. . . later rule[s] to be impermissible'" under the statute. *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) (quoting *Kennedy v. Border City Sav. & Loan Ass'n*, 747 F.2d 367, 370 (6th Cir. 1984) (concurring opinion)).

Other federal Courts of Appeal have likewise limited "willful" violations of the statute to instances in which a party acts with the understanding that its actions are not permitted. In the words of the Eighth Circuit, a "willful" violation of the FCRA is nothing less than the "knowing and intentional commission of an act the defendant knows to violate the law." *Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002). The Seventh Circuit has expressed this threshold in even more detail: "[t]o act willfully, a defendant must knowingly and intentionally violate the [FCRA], and it 'must also be conscious that [its] act impinges on the rights of others.'" *Wantz v. Experian Information Solutions*, 386 F.3d 829, 834 (7th Cir. 2004) (citations omitted).

These cases are also entirely consistent with this Court's own articulation of the core concept that:

> ***punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.***

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 419, 123 S. Ct. 1513, 1521 (2003) (citations omitted) (emphasis added). For these reasons, this Court has repeatedly

> admonished that punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.

Id., 538 U.S. at 417, 123 S. Ct. at 1520 (internal quotation and citations omitted).

These cases, and this Court, have it right where the Ninth Circuit's decision has it wrong. In all of the FCRA cases

decided in other circuits, the defendant was protected from the most severe sanctions under the FCRA where the defendant lacked the knowledge that the actions at issue violated the statute. Of particular note – and particular importance to the business and legal communities – ***none*** of these cases suggest that a business can be subjected to such penalties for taking the advice of a lawyer regarding a matter of first impression under a statute, if a subsequent judicial decision reaches a different conclusion than that of the lawyer.

The Ninth Circuit's decision improperly inverts this state of affairs. By holding that reliance upon the advice of counsel "is not dispositive" of the issue of willfulness, the Ninth Circuit has eliminated the clear guidance that is vital to the FCRA and the businesses which operate under it. *Reynolds*, 435 F.3d at 1099. And the Ninth Circuit's decision stands to cause even more disruption, in that under the decision, "[w]hether or not there is a willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation. In some cases, it may also depend in part on . . . the testimony of the companies' executives and counsel." *Id.*

In other words, the Ninth Circuit's decision stands for the proposition that the mere allegation of "willfulness" may allow for discovery into the underlying legal advice and opinion, along with attendant erosions of the confidential relationship between attorneys and their clients. With one stroke, the Ninth Circuit decision eliminated any meaningful guidance and protection for businesses that must practice under the FCRA, increased the likelihood of litigation under the statute, and compromised the attorney-client relationship. That decision should not be permitted to stand.

B. The Uncertainty Caused by the Effect of the Ninth Circuit's Decision upon Other Statutes

The Ninth Circuit's decision is also likely to lead to uncertainty and inconsistent results under other federal statutes which utilize the same language and structure regarding "willful" violations of their terms. Like the FCRA, these statutes play key roles in regulating the nation's workplaces and jobs. If allowed to stand, the Ninth Circuit's decision would cause the same behavior –

conferring with counsel – to lead to dramatically different results under these substantially similar statutes.

1. The Age Discrimination in Employment Act

For example, the Age Discrimination in Employment Act ("ADEA") provides that "liquidated damages shall be payable only in cases of ***willful*** violations" of the statute. 29 U.S.C. § 626(b) (emphasis added). Like the FCRA, the ADEA does not expressly define "willful." *Id.*

In determining what is a "willful" violation of the ADEA, this Court held that "willfulness" was limited to instances in which the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126, 105 S. Ct. 613, 624 (1985). Accordingly, in the *Trans World* case, this Court reversed an award of liquidated damages because the employer conferred with counsel in attempting to determine whether its proposed actions would violate the ADEA. *Id.*, 469 U.S. at 130, 105 S. Ct. at 626.

This Court reaffirmed its definition of "willful" in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617, 113 S. Ct. 1701, 1710 (1993), and further explained that the statute's extra-compensatory damages provision did ***not*** apply where "an employer incorrectly but in good faith and non-recklessly believes that the statute permits a particular age-based decision." *Id.*

The Ninth Circuit's definition of "willful" under the FCRA is a distinct departure from this well-established level of culpability. Permitting that construction to stand would not only cause a split of authority under the FCRA, but also open a split between that statute and the ADEA. Businesses that make a good-faith effort to know and comply with these laws ought not be subjected to extreme penalties under one statute for the same behavior that is commended as exculpatory under the other.

2. The Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA") is another statute of the utmost importance to businesses and employees across the nation. *See* 29 U.S.C. Sec. 216(e). Like the ADEA, the FLSA also includes enhanced penalties for "willful"

violations of its terms, without providing a definition of what is a "willful" violation. *See* 29 U.S.C. §§ 216(e), 255(a) (extending limitation period for claims arising out of "willful violation" of statute), 626(b) ("liquidated damages shall be payable only in cases of *willful* violations" of statute).

Courts – ***including the Ninth Circuit*** – have consistently held that a "willful" violation of this statute requires cognition or deliberate indifference to the terms of the statute. As the Ninth Circuit itself held, a "willful" violation occurs only when the "employer disregards the very 'possibility' that it was violating the statute." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908-09 (9th Cir. 2003).

The Ninth Circuit's decision in this case posits a markedly different view of "willfulness." Consultation with counsel should refute the contention that a possible violation of the statute was disregarded; but the Ninth Circuit's decision would enable "willful" violations to be found even after seeking legal advice. Again, given the substantial similarity of language and remedial schemes in the FCRA and the FLSA, a business should be treated similarly under both statutes. The Ninth Circuit's decision in this case undoes that result and leaves inconsistency and uncertainty in its place.

3. The Family and Medical Leave Act

Still another statute of general application, the Family and Medical Leave Act ("FMLA"), also provides for enhanced remedies in the event of a "willful" violation of its terms. *See* 29 U.S.C. § 2617(c)(2) (limitation period extended for claims arising out of "willful" violations of statute). And as with the other statutes discussed above, courts have held that a "willful" violation means "deliberately [choosing] to avoid researching the law's terms or affirmatively [evading] them." *Hoffman v. Professional Med. Team*, 394 F.3d 414, 419 (6th Cir. 2004).

A businessperson who consults with her counsel can hardly be said to have "deliberately chosen to avoid researching the law's terms or affirmatively evade them." Yet under the Ninth Circuit's holding in this case, the very same conduct could constitute a "willful" violation of the FCRA. There is no sense to be made of this dichotomy, and no guiding principles to be taken from it.

C. The Importance of Statutory Protection for this Nation's Businesses and Employers

There is no question that the FCRA and these other statutes provide important protections for consumers and employees. But these statutes ***also*** provide crucial protection for businesses and employers, by informing them how to conduct their business without transgressing the law. *See, e.g., Duffy v. Landberg,* 215 F.3d 871, 874-75 (8th Cir. 2000) (Fair Debt Collection Practices Act protects consumers, and compliance also protects businesses against liability); *see also Jang v. A.M. Miller & Assoc.*, 122 F.3d 480, 483-84 (7th Cir. 1997).

The Ninth Circuit's holding extinguishes this protection under the FCRA. The Ninth Circuit's holding divests the statute of any meaningful guidance for individuals and entities striving to ensure their compliance with the statute, while introducing needless risk, uncertainty and inconsistency into what had been a settled area of law upon which American businesses rightfully relied. The Ninth Circuit's holding should be reversed.

CONCLUSION

For all of these reasons, and those stated by the Petitioners, the Petitions for Writs of *Certiorari* should be granted.

Respectfully submitted,

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August 21, 2006